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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
Access Charge Reform	)	CC Docket No. 96-262
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
Usage of the Public Switched Network by Information Service and Internet Access Providers	)	CC Docket No. 96-263

REPLY COMMENTS OF ICG TELECOM GROUP, INC.

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February 14, 1997

No. of Copies rec'd 0+16
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TABLE OF CONTENTS

PAGE

SUMMARY

The comments of the incumbent local exchange companies ("ILECs") differ only as to the degree to which the Commission's market-based deregulation of their markets should be accelerated. More impressive is the unanimity of both facilities based competitive local exchange carriers ("CLECs"), and those who are completely dependent upon ILEC facilities to compete in the local and interexchange markets in urging the Commission to ensure that local competition is a reality before lifting the constraints that have facilitated the growth of competition. ALTS, WorldCom, and TCG all oppose the Commission's market-based approach. Each of these companies argues that the Commission's deregulatory proposals are exceedingly premature, because they promise ILEC regulatory relief before the complete removal of barriers to entry for new access competitors. Similarly, the long distance companies, who have so recently experienced the difficulties of transitioning from a monopoly to a competitive environment, all maintain that market conditions do not currently exist that would constrain ILEC pricing discrimination.

The Commission's current proposals ignore its history of successful implementations of competitive reforms. The Commission's deliberate management of the transition to competition in the CPE market was measured, protected the interests of new entrants, ensured the integrity of the national network, and prevented anti-competitive behavior of the dominant carrier. The Commission followed this pattern when it later guided the long distance market to full competition.

The Commission has a clear record of taking measured steps to introduce competition into monopoly controlled markets. It has done so to ensure the viability of new entrants, to maintain stability in the markets, to protect the interests of consumers, and to prevent anti-competitive behavior of the dominant carriers during the transition to competition. In the instant proceeding, however, the Commission appears determined to deregulate the local markets at a record pace.

The Commission also appears to have reversed its priorities from previous market opening proceedings. In the CPE and long distance markets, the Commission undertook to protect new entrants until they attained footholds in the market. Here the Commission proposes to limit CLECs' ability to compete on the basis of price by accelerating ILEC pricing flexibility.

Perhaps the most crucial role the Commission played in facilitating interexchange competition was its management of the competitors' ability to interconnect to the Bell Operating Companies ("BOCs") exchange access facilities. Interconnection is equally vital to competitive local exchange carriers. For local competition to succeed, the Commission must show the same zeal in fostering the interests of CLECs' that it showed in implementing equal access.

The Commission may not summarily abandon the principles it has established and enforced over the past quarter century of deregulating monopoly markets. When the Commission afforded AT&T streamlined tariff relief in certain of its business services, the Commission based its decision on demand elasticity, supply elasticity, AT&T's pricing of business services, and AT&T's loss of market share in this segment. The Commission used similar criteria to evaluate the propriety of relieving AT&T of the regulatory burdens of a dominant carrier in 1995.

The divestiture of the Bell System created a framework for the development of competition in the long distance market. Similarly, the 1996 Act provides a starting point for the development of competition in the local markets. But we are no closer to actual local competition today than the long distance market was in 1984. Indeed, the ILECs control of local facilities provides a greater barrier to entry, a poses a greater threat to enduring competition, than did AT&T's interstate network.

The Commission's first order of business should be to ensure the full compliance with the provisions of Sections 251, 252, 254, and 271 of the 1996 Act, and completion of the *Expanded Interconnection* proceeding. These preconditions facilitate, but do not create or ensure, actual competition. The regulatory relief suggested in the Commission's market-based proposals can be granted only after the Commission is satisfied that actual competition is present in an ILEC's market, and is likely to endure. The Commission should consider the same factors it considered in analyzing the level of competition in the equipment and long distance markets that it deregulated: demand elasticity, supply elasticity, the pricing practices of the ILEC and the CLECs in the market, the effect of the ILEC's size and capitalization on the continued growth of competition in the market, and market share data.

ICG's proposal to accomplish access reform through a four-year, across-the-board, phase-in of access reductions provides a solution which balances the interests of many of the parties. ICG appears to be one of several parties in the middle, all of which support moving access charges to cost over the next two to five years. Whether over a four- or five-year period, a phased reduction of access charges to cost will yield cost savings for consumers and accommodate such embedded cost recovery as the Commission may find appropriate. The Commission could initiate a proceeding to implement separations reform to address recovery of any residual embedded costs that remain unrecovered after the phase down of access to cost.

ICG supports ALTS' position in its Reply Comments that terminating access is, indeed, subject to market forces, and should not be regulated. Interexchange carriers and sophisticated business customers can take steps to discourage terminating carriers from charging excessive rates for access. Moreover, should such practices become more than anecdotal, forms of "arbitrage," including a technological solution, will undoubtedly be developed to close the gap between originating and terminating access.

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REPLY COMMENTS OF ICG TELECOM GROUP, INC.

ICG Telecom Group, Inc. ("ICG"), through its undersigned counsel, hereby submits its Reply Comments on the issues identified in the *Notice of Proposed Rulemaking* portion of this docket.[1] ICG associates itself with the Comments and Reply Comments filed by the Association for Local Telecommunications Services ("ALTS") and joins generally in those comments.

I. ILEC PRICING RELIEF

A. The Positions Of The Parties

Predictably, the incumbent local exchange companies ("ILECs") eagerly support the Commission's proposed timetable for the elimination of regulatory constraints on the

[1] Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry, FCC 96-488, ¶¶ 50-299 (released December 24, 1996) ("Notice").

ILECs. The only points of disagreement among them are the Phase 1 and Phase 2 triggers that should be eliminated as unnecessary, and the degree to which deregulation of their markets should be accelerated.

But even more impressive is the unanimity of both facilities based companies and those who are completely dependent upon ILEC facilities to compete in the local and interexchange markets. These companies, whose fate will decide whether LEC competition works, from the largest to the smallest, urge the Commission to ensure that local competition is a reality before lifting the constraints that have facilitated the growth of competition. ALTS, which is made up of competitive local exchange carriers, notes that competition is incipient at best, and that its members have less than 3% of the combined interstate and intrastate access markets. ALTS argues that the Commission's deregulatory proposals are exceedingly premature because they promise ILEC regulatory relief before the complete removal of barriers to entry for new access competitors. The removal of three kinds of regulatory barriers must precede any ILEC relief: (1) ILEC control over bottleneck facilities currently at issue in the *Expanded Interconnection*[2] and the *Local Competition*[3] proceedings; (2) persistent legal requirements imposed by state and local governments that are inconsistent with the Telecommunications Act of 1996 ("1996

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[2] *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (subsequent history omitted).

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (*Local Competition Order*), Order on Reconsideration, 11 FCC Rcd 13042, *petition for review pending and partial stay granted sub nom., Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir.), *partial stay lifted in part, Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir. Nov. 1, 1996).

Act"),[4] and (3) removal of other competitive barriers to effective competition outside the direct control of ILECs, such as access to the facilities of building owners and utilities.

MFS WorldCom maintains that permanent access reform will be achieved only through full implementation of local competition, that ILECs must not be guaranteed recovery of revenues absent local competition, and additional ILEC pricing flexibility should be subject to checks on discrimination and cross-subsidization. MFS WorldCom urges the Commission to delete from Phase 1 any pricing flexibility that would enable ILECs to discriminate, including contract tariffs, competitive response tariffs, additional authority for volume discounts or discounts for terms of longer than three years, and deregulation of new services that can be substituted for existing services.

TCG reminds the Commission that competition has succeeded only when the Commission has proceeded deliberately, as in the *Competitive Carrier* proceeding.[5] TCG also notes that the Commission's successful deregulation of special access and

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4 Pub. L. No. 104-104, 110 Stat. 56, *to be codified* at 47 U.S.C. §§ 151 et seq.

5 *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1(1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 4 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Red. Reg. 46,791(1983); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated, AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 113 S.Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated, MCI Telecommunication Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the *Competitive Carrier* proceeding).

interexchange services was accomplished by ensuring the success of the new market entrants before relaxing constraints on the incumbent dominant carrier.

The divestiture of the Bell System in 1984 created the framework for interexchange competition, but it was the Commission's deliberate implementation of competitive policies, including the *Competitive Carrier* proceeding, that has produced the robust long distance market that exists today. Thus it is instructive to note the positions of the key participants in the evolution of that market, and who are now preparing to attempt entry to their access providers' home markets. AT&T argues that market conditions do not currently exist that would constrain ILEC pricing discrimination. It opposes the Commission's price flexibility proposals on the grounds that they would allow anticompetitive cross-subsidization. Specifically, AT&T opposes the Commission's Phase 1 relief, and proposes that the Commission initiate a rulemaking to establish the appropriate tests for effective competition in the local market that would justify deregulation of the ILECs.

MCI, whose experience in challenging dominance in the interexchange markets gives it special standing, also opposes the Commission's Phase 1 relief. MCI has submitted a study substantiating competitors' claims that the flexibility afforded under the price cap regime has allowed ILECs to price anticompetitively, and that ILEC revenue and line growth show that they retain inherent competitive advantages. MCI also argues that the Commission's deregulatory proposals will undermine the Commission's *Local Competition Order* because the ILECs will have a greater incentive to make unbundling difficult, terminating access pricing is ignored, and consumers will be harmed because of slow and uneven progress toward local competition.

The third major facilities based interexchange carrier, Sprint, also opposes most of the Commission's Phase 1 proposals. Sprint supports deaveraging of access charges and streamlining the introduction of new services, but opposes volume and term discounts, contract tariffs, and competitive responses to RFPs as inclusions in Phase 1 relief. Sprint recommends that the ILECs should be afforded pricing flexibility only after the Commission has established that local competition exists and that competitive market conditions warrant such relief.

B. The Commission's Objectives, The Commission's Experience, And The Current Proposals

The Commission states that the "overriding goal in this proceeding is to adopt revisions to our access charge rules that will foster competition for these services and eventually enable marketplace forces to eliminate the need for price regulation of these services."[6] However, as the real-world participants in the marketplace have all demonstrated, the Commission's market-based proposals will not create and preserve a competitive local market. On the contrary, these proposals will reward the ILECs for taking the tentative first steps that all agree must be taken for competition even to begin, but which are not sufficient to allow competition to flourish. Once rewarded prematurely, however, the ILECs will have no further incentive to facilitate competition. They will have the ability and the incentive to stifle any further development of local competition through the pricing flexibility proposed by the Commission. The Commission's inexplicable haste

[6] Notice, ¶ 140.

to deregulate the ILECs ignores the history of successful implementations of competitive reforms.

1. Customer Premises Equipment.

In customer premises equipment ("CPE"), the *Hush-a Phone*[7] and *Carterfone*[8] decisions had established the right of consumers to use privately owned PBX's and key systems by the late 1960s. However, the Commission's Registration Program to effectuate this transition was not adopted until 1976.[9] By 1980, the Commission had become satisfied that the level of competition in the CPE market was progressing sufficiently to eliminate rate regulation of carrier-provided CPE.[10] However, because of the Bell System's market power, the Commission required AT&T to sell CPE through a separate subsidiary. "[T]he separation requirement should be applied only to those telephone companies having sufficient market power to engage in effective anti-competitive activity on a national scale and which possess sufficient resources to enter the competitive market through a separate subsidiary."[11] Divestiture terminated AT&T's ability to use interconnection

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[7] *Hush-a-Phone Corp.* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956).

[8] 13 FCC 2d 420, *recon. denied*, 14 FCC 2d 571(1968).

[9] *Proposal for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, Second Report and Order, 58 FCC 2d 736 (1976), *aff'd sub nom., North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977).

[10] *Amendment of Section 64.702 of the Commissions Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, ¶¶ 159-161 at 446-47, *recon.*, 84 FCC 2d 50 (1980) (*"Computer II"*) (subsequent history omitted).

[11] 77 FCC 2d at 465, ¶ 205; at 469, ¶ 222. In the context of CPE, the Commission spoke in terms of "national scale," but the same "market power"logic applies to each RBOC within its region.

standards to discriminate in favor of its own CPE customers. Still, it was not until almost six years after *Computer II* that the Commission concluded that AT&T's market power and dominant market share had dissipated sufficiently so that structural safeguards were no longer necessary.[12] By this time, there was such an abundance of non-AT&T CPE in the market that it would have been counterproductive for it to try to misuse its control of its network in a manner that would make competitors' equipment incompatible. AT&T's market share in PBX's had dropped from 45% in 1980 to 19-26% in 1984, and from 58% to 25-33% in key systems over same period.[13] Only then, after AT&T lost half of its market in each segment, did the Commission conclude the markets were sufficiently competitive that AT&T could be freed of regulatory constraints.

The Commission's deliberate management of the transition to competition in the CPE market was measured, protected the interests of new entrants, ensured the integrity of the national network, and prevented anti-competitive behavior of the dominant carrier. While some might argue that the time between *Carterfone* in 1968, and the *Structural Relief Order* in 1985, was too long, it is uncontroverted that a competitive market was developed, with enduring consumer benefits, while satisfying the equally important goal of encouraging new entrants without impairing service in any way.

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[12] *Furnishing of Customer Premises Equipment and Enhanced Services by AT&T*, 102 FCC 2d 655, 675-77, ¶¶ 33-36 (1985).

[13] *Id.* at 677, n.63.

2. Interexchange Services.

MCI was first authorized to initiate point-to-point services in 1969, but it took a decade for meaningful private line competition to develop.[14] After the court's decision in *Execunet* in 1978, it took ENFIA tariffs,[15] the *Competitive Carrier* proceedings, and the divestiture of the Bell System in 1984 to create the conditions under which interexchange competition could develop. AT&T was not allowed to offer contract tariffs until 1989.[16] It was not allowed to file streamlined tariffs for some business customer markets until 1991,[17] and was not relieved of the regulatory burdens of a dominant carrier until 1995.[18]

3. The Current Proposals.

The Commission has a clear record of taking measured steps to introduce competition into monopoly controlled markets. It has done so to ensure the viability of new entrants, to maintain the stability and predictability in markets necessary for

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14 *Microwave Communications Inc.*, 18 FCC 2d 953, 966 (1969), *recon.*, 21 FCC 2d 190 (1970). The Commission intended to limit MCI to private line services, but its Section 214 authorization was not so limited, and the United States Court of Appeals for the D. C. Circuit authorized MCI to enter the switched public message telephone service in *MCI Telecommunications Corp.* v. *FCC* 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) ("Execunet").

15 *Network Facilities for Interstate Access (ENFIA),* Memorandum Opinion and Order, 71 FCC 2d 440 (1979).

16 *AT&T Communications, Revisions to Tariff FCC No. 12*, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989), *rev'd and remanded sub nom.*, *MCI Telecommunications Corp.* v. *FCC*, 917 F.2d 30 (D.C. Cir. 1990), *modified on remand*, 6 FCC Rcd 7039 (1991).

17 *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880 (1991).

18 *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271(1995) (*AT&T Non-Dominance Order*).

competition to mature, to protect the interests of consumers, and to prevent anti-competitive behavior of the dominant carriers during the transition to competition. In the instant proceeding, however, the Commission appears determined to deregulate the local markets at a record pace. It proposes broad pricing relief for the ILECs upon the satisfaction of Phase 1 conditions, and the Commission expects "that at least some incumbent LECs reasonably should be able to satisfy these conditions during 1997."[19]

The Commission also appears to have reversed its priorities from previous market opening proceedings. In the proceedings described above, the Commission undertook to protect new entrants until they attained footholds in the market. In the CPE market, the dominant carrier was forced to tariff its equipment offerings, and later offer them only through a separate subsidiary. In the interexchange market, new entrants paid lower interconnection fees, and were relieved of the statutory requirement to file tariffs:

> There is no evidence that it is in the public interest for us to continue receiving streamlined tariff and Section 214 filings from certain specialized common carriers to prevent them from charging unjust or unreasonable rates or making service unavailable. . . . The combination of our ability to investigate rates of non-dominant carriers in response to complaints or on our own initiative and market forces will ensure that these carriers' rates are just and reasonable.[20]

Thus, AT&T's competitors were given significant advance notice of AT&T's pricing plans, were free to undercut AT&T's published rates, and could forestall AT&T's ability to make competitive responses through regulatory proceedings. Even the D. C. Circuit recognized the market advantage the Commission conferred on AT&T's competitors when

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[19] Notice, ¶ 163.

[20] *Competitive Carrier*, Fourth Report and Order, *supra*, 95 FCC 2d at 578 and 580, ¶¶ 36, 38.

it reviewed the first Tariff 12 filing. The court commented, "Of course, the present regulatory situation presents advantages to AT&T's competitors, who can urge the FCC to suspend or investigate the tariffs or file complaints against AT&T based, presumably, on better information than is available to AT&T concerning their competitor's practices. But the propriety of this asymmetrical regulatory system is not before us."[21] The predictable consequence of the Commission's asymmetrical policies was that several facilities based carriers, and hundreds of resellers, were given the time and regulatory assistance to develop viable market alternatives to AT&T's service offerings. The Commission did not begin to lift regulatory restraints on AT&T until its market share losses were significant and the dissipation of its market power made them irreversible.

Unlike AT&T, which had been divested of its control of bottleneck facilities, the ILECs retain monopoly control over exchange and exchange access facilities. Given the Commission's concerns about fostering competition in these markets, one would expect that its policies would resemble those that have been proven effective in previous proceedings. On the contrary, the Commission intends to prevent new entrants from gaining the advantages that new entrants were afforded in the CPE and long distance markets. Justifying the broad pricing relief proposed in Phase 1, the Commission stated:

> We propose these changes because, once a LEC satisfies the triggers we have identified, competitive forces should come most quickly to bear on the provision of interstate access in low-cost geographic areas and to large customers. Removing these restraints should permit LECs greater ability to price economically and therefore bring more competitive pressures, including lower prices, in areas and for services where we expect competitive forces initially to be strongest. Such reforms would have the goal of fostering efficient and effective

21 *MCI* v. *FCC, supra,* 917 F.2d at 35.

> competition, to the benefit of customers, wherever possible. Without such reform, continuing uneconomic regulation may serve primarily to permit inefficient new entrants to gain market share among the most attractive customers rapidly.[22]

Thus, in a dramatic departure from the previous policies, which history has shown to have been successful in protecting the public interest, the Commission here proposes to limit new entrants' ability to compete on the basis of price. Moreover, while it patiently waited years for new CPE and interexchange competitors to establish their customer bases, the Commission is now willing to speculate on the possibility that competitive forces may come to bear when certain heretofore unproven preconditions are met. And to confirm its new attitude towards putative competitors to monopoly providers, the Commission dismisses them as "inefficient new entrants."

C. Using The Commission's Experience

Perhaps the most crucial role the Commission played in facilitating interexchange competition was its management of the competitors' ability to interconnect to the Bell Operating Companies ("BOCs") exchange access facilities. Prior to divestiture, the Commission enforced differential rates for access charges, which afforded AT&T's competitors significant discounts in the prices they paid for access.[23] These discounts, their lower cost structures, and the regulatory freedom relative to AT&T allowed the competitors to undercut AT&T's tariffed rates.[24] After divestiture, the Commission strictly enforced the equal access provisions of the Consent Decree,[25] which mandated that the

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22 Notice, ¶ 168.

23 *MTS/WATS Market Structure, Phase III*, Notice of Proposed Rulemaking, 94 F.C.C. 2d 292, ¶¶ 45-58 (1983).

24 See discussion of *AT&T Non-Dominance* proceeding, *infra*, at pp. 16-18.

25 *United States v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982).

BOCs provide exchange access equal in quality to that enjoyed by AT&T. The provision of equal access, together with the construction of nationwide fiber networks, permitted AT&T's facilities-based competitors, over time, to compare their services favorably to those offered by AT&T.

Interconnection is equally vital to competitive local exchange carriers. The Commission's prompt initiation of a proceeding to implement Sections 251 and 252 of the 1996 Act and the resulting *Local Competition Order* are commendable, and the Commission correctly attempted to lay the groundwork for a competitive local exchange environment. However, for local competition to succeed, the Commission must show the same zeal in fostering the interests of CLECs that it showed in implementing nondiscriminatory treatment for all IXCs. The Commission undertook to open the exchange access services market to competition in the *Expanded Interconnection* proceeding.[26] The goal of this docket was to provide physical or virtual co-location to the LEC networks for competitive access providers, and to ensure reasonable rates for such access. While the Commission has established the framework for expanded interconnection,[27] the tariffs necessary to implement the new regime remain under investigation. Even after the enactment of the 1996 Act, the disputed rates continue to be the basis of the rates currently being charged for co-location under negotiated agreements. In fact, many ILECs simply rely on the tariffed rates, terms and conditions still under

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[26] *Expanded Interconnection with Local Telephone Company Facilities*, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259 (1991).

[27] *Expanded Interconnection*, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994).

investigation, and will not further negotiate co-location rates despite the new statutory requirements for physical co-location and interconnection on just and reasonable terms and rates.[28] The *Notice* is silent as to the Commission's commitment to resolving the *Expanded Interconnection* proceeding. Interconnection on just and reasonable terms, conditions, and rates is as crucial to competitive local exchange carriers today as equal access was to the interexchange competitors in 1984. The Commission's market-based proposal is fatally flawed for failing to acknowledge the necessity of resolving statutorily imposed interconnection requirements as a precondition to any pricing flexibility for the ILECs.

The Commission may not summarily abandon the principles it has established and enforced over the past quarter century of deregulating monopoly markets. It seems to be preparing for such a reversal when it professes a belated inability to determine when competition exists in a market:

> First, we seek comment on how to determine when competition is sufficient . . . we could measure market share as one factor, among others, in determining whether competition exists in a given market for purposes of removing the regulatory constraints we have identified. As we observed in the *Price Cap Second NPRM*, we previously have used market share as one factor in measuring the presence of competition. Nevertheless, there are drawbacks to using market share. An analysis of the level of competition for incumbent LEC services based solely on an incumbent LEC's market share at one time may not provide an adequate basis for us to conclude that a competitive presence truly exists. Further, we lack data on the relative market share of incumbent LECs and their rivals, and thus would need to develop reasonable and nonburdensome ways to gather that information *if we were to rely on it* . . . . We seek comment on whether, *notwithstanding an absence of competitive entry*, the incumbent could be adequately restrained from raising prices such that it could obtain Phase 2 treatment.[29]

28 47 U.S.C. § 251(c).

29 Notice, ¶ 203; emphasis added.

Thus, the Commission seems to be signaling that it would prefer not to compel ILECs to lose market share before declaring their markets competitive and deregulating them.

The Commission has the authority to require carriers to submit whatever data it needs to develop a record in this or any other proceeding. As ICG said in its Comments, the Commission already receives ample data from major LECs, reported in *Statistics of Common Carriers*. ICG is willing, given proper assurances of confidentiality, to provide data concerning customer lines and access minutes, and believes that procedures can be developed to gather such data from carriers who do not currently report, so that the Commission can have data aggregated at the local, state, regional and national level. As discussed in the ALTS Comments, there is ample industry data in the record to demonstrate that the ILECs control more than 97% of the total interstate and intrastate access market. While the percentages may vary from state to state, with markets shares above 90% there is ample time for the Commission to determine which data it deems relevant, and to mandate the procedures to collect it, long before any credible suggestion that actual competition is on the horizon. But there should be no serious question about the existence of, or the Commission's ready access to, data which would conclusively establish ILECs' market shares in geographic markets throughout the country.

Further, once the Commission collects this data, it would be inconceivable that the Commission would choose *not* to rely on it, as it suggests it might in the *Notice*. Should the data reveal "an absence of competitive entry," there could be no lawful justification for deregulating an ILEC's market. In the absence of competition for the provision of essential services, regulation serves as a surrogate to protect the ratepayer from abuse of monopoly power. The Commission proposes to complete the price deregulation of ILECs in Phase 2 by eliminating price cap service categories within baskets, removing the ban on differential pricing for access among different classes of customers, ending mandatory rate structure rules for transport and local switching, and consolidating traffic-sensitive and trunking baskets. Without competitive providers of access, an ILEC would have no economic disincentive to price at cap ceilings.

Should the data reveal some degree of competitive entry, it would be unprecedented for the Commission to decline to consider an ILEC's market share as a primary factor in the determination of the existence of competition. When the Commission lifted the *Computer II* restrictions on AT&T, eliminating the separate subsidiary requirement, it specifically cited AT&T's loss of market share in the PBX market,[30] and five years of steady losses of CPE market share[31] as factors that convinced the Commission that competition was healthy in the CPE market:

> In the five years since we imposed the structural separation requirements, AT&T's CPE market shares have undergone a steady and rapid decline to the point where it cannot be said to "dominate any particular segment of the CPE marketplace. In light of this robustly competitive marketplace, our previous concerns that AT&T would be able to displace competition and reestablish a dominant position in CPE have been greatly reduced.[32]

30 *AT&T Structural Relief Order*, 102 FCC 2d at 675-76, ¶ 34.

31 *Id.* at 676-77, ¶ 36, n.63.

32 *Id.*; *AT&T Structural Relief Order*, Memorandum Opinion and Order on Reconsideration, 104 FCC 2d 739, 744 ¶ 8 (1986).

When the Commission afforded AT&T streamlined tariff relief in certain of its business services,[33] the Commission based its decision on demand elasticity (business customers will switch carriers to obtain price savings), supply elasticity,[34] AT&T's pricing of business services,[35] and the loss of market share in this segment. The Commission found that AT&T's market share had fallen to 50% in the business segment, "a level that is not incompatible with a highly competitive market."[36]

The Commission used similar criteria to evaluate the propriety of relieving AT&T of the regulatory burdens of a dominant carrier in 1995.[37] The Commission found significant

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[33] *In the Matter of Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880 (1991).

[34] "First, AT&T's analysis of traffic volumes and peak traffic levels appears to demonstrate that MCI and Sprint could immediately absorb as much as fifteen percent of AT&T's business day traffic without any expansion of their existing capacity. This capacity is in itself more than sufficient to constrain AT&T's pricing behavior insofar as it could accommodate a substantial number of new customers. Moreover, based on the Bell Labs study, it appears that in three to six months time MCI and Sprint could begin adding new capacity to their networks, reducing their need to overflow any traffic onto AT&T's network and increasing their own present and future capabilities. Indeed, this study shows that within five months time Sprint and MCI, together could add about 25 billion minutes of new capacity to their networks for a combined investment of about $600 million. These facts, taken together, establish that AT&T's competitors have substantial excess capacity available immediately and in the relative short-term." *Id.* at 5888-89, ¶ 46.

[35] "After 638 tariff filings in the Business Services Basket (Basket 3), AT&T has yet to exceed the price cap ceiling for that Basket. Moreover, all but one of AT&T's Basket 3 filings have been below the applicable upper service rate band. AT&T's ProAmerica service, the lowest volume service in the Business Services Basket, has been priced substantially below its upper rate band. We believe that these lower-than-required prices for Basket 3 services reflect the competitiveness of business services." *Id.* at 5889, ¶ 49.

[36] *Id.* at 5889-90, ¶¶ 50-51. In the *Competitive Carrier* proceeding, the Commission cited *Broadway Delivery Corp.* v. *United Parcel Service of America*, 651 F.2d 122, 129 (2d Cir.), cert. denied, 454 U.S. 968 (1981) for the proposition that "a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power." Fourth Report and Order, *supra*, 95 FCC 2d at 562, n. 18.

[37] *AT&T Non-Dominance Order*, *supra*, 11 FCC Rcd at 3292, ¶ 36.

demand elasticity-- consumers changed carriers 18 million times in 1993, 27 million times in 1994, and the projected rate for 1995 was for 30 million changes.[38] One in five residential customers changed carriers in 1994. On the issue of supply elasticity, the Commission found that "AT&T's competitors have enough readily available excess capacity to constrain AT&T's pricing behavior-- *i.e.*, that they have or could quickly acquire the capacity to take away enough business from AT&T to make unilateral price increases by AT&T unprofitable.[39] Price offers to residential customers demonstrated that AT&T lacked market power. Between 1991 and 1994, AT&T's best available discounted residential rates fell between 25 and 28%. Sprint and MCI frequently initiated price discounts, to which AT&T promptly responded. This pricing behavior convinced the Commission that AT&T lacked the market power to raise and sustain higher prices to residential customers.[40] Market share data was also crucial to the Commission's finding that the interexchange market was competitive:[41]

- Between 1984 and 1994, AT&T market share in revenues and minutes fell from 90% in both categories to 55.2% and 58.6%, respectively.
- Other than AT&T, Sprint, and MCI, the share of all other carriers rose from 11.8% in 1991 to 17.3% in 1994.
- AT&T supplied only 25.6% of resale services in 1994, and this share was expected to drop to 20.3% in 1996.

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38 *Id.* at 3300, ¶ 53.

39 *Id.* at 3303, ¶ 58. Sprint and MCI alone had enough capacity to absorb 15% of AT&T's customers immediately, and would have enough capacity to handle two-thirds of AT&T's customer base within a year. *Id.* at 3303-04, ¶¶ 58-59.

40 *Id.* at 3312-13, ¶¶ 78-80.

41 *Id.* at 3307-08, ¶¶ 67-72.

The large number of new competitors[42] in the interexchange market, and AT&T's loss of thirty three share points, led the Commission to conclude that the market was competitive and that AT&T no longer enjoyed market power:

> Our determination fifteen years ago in the First Report and Order that AT&T possessed market power rested on several market characteristics including the facts that AT&T controlled, through its ownership of the Bell Operating Companies, local access facilities for over 80 percent of the nation's phones, and that AT&T was virtually the only supplier of all interexchange services . . .
>
> The behavior of the market between 1984 and 1994 suggests intense rivalry among AT&T, MCI and Sprint. Moreover, we note that AT&T's market share fell approximately 33 percent between 1984 and 1994. The fact that the rate of decline of AT&T's market share has decreased during the last five years is not an indication of market power. Rather, it may simply reflect the fact that, since 1990, most customers, including resellers, have had dozens of choices of equal access carriers, and that AT&T's competitors no longer have the advantage of lower access costs that enabled them to underprice AT&T and capture market share. Accordingly, we find the decline in AT&T's market share suggests that AT&T no longer possesses market power.[43]

ICG has set forth the above analysis at some length *not* because ICG means to suggest that exchange service and exchange access competitors should be afforded tariff advantages similar to those that the interexchange competitors used to penetrate AT&T's markets. Instead, ICG submits that the Commission has established a successful record of opening closed markets to competition, and that it should employ the same basic principles that have proved to be effective. The central tenet of the Commission's policies in the

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42 "AT&T faces at least two full-fledged facilities-based competitors . . . There are also several hundred small carriers that primarily resell the capacity of the largest interexchange carriers. We believe that the significant excess capacity and large number of long-distance carriers limits any exercise of market power by AT&T." *Id.* at 3308, ¶ 70.

43 *Id.*, ¶¶ 69 and 72.24

equipment and long distance proceedings was its insistence that there be demonstrable competition in the dominant carriers' markets before they were given regulatory freedom. Potential competition nor the mere conditions necessary for competition was a sufficient trigger to relax constraints. Even the presence of numerous well financed new entrants was insufficient. In each instance, the Commission monitored the development of actual competition in the markets, and required a showing that competition was so well entrenched that it was unlikely that the formerly dominant carrier would be able to "displace competition and reestablish a dominant position"[44] in the market.

The Commission maintained AT&T's dominant carrier status for eleven years after it had lost control of bottleneck local exchange and exchange access facilities. All of the ILECs in this proceeding operate such facilities, which would justify an even more cautious approach than the Commission adopted in the long distance market. This is particularly important at this stage in the industry's development because of the increasing pattern of consolidation of ILECs who intend to reintegrate interexchange service with their local services at the earliest opportunity.

The Commission is not free to turn its back on the approach it has consistently used -- successfully -- to implement competition in previously monopolistic markets without some rational explanation for the departure. *See Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 852 (1970). It is true that the 1996 Act provides a starting point for the development of competition in the local markets. But it is equally true that, for example, the divestiture of the Bell System created a framework for the development of

44 *AT&T Structural Relief Order, supra*, 102 FCC 2d at 676-77, ¶ 36, n. 63.